Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 JULY 3, 1991 No. 26/27

This issue contains:

AVAILABILITY OF BOUND VOLUMES
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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

ERRATUM

(T.D. 91-55)

FOREIGN CURRENCIES

T.D. 91-55 was originally published in the CUSTOMS BULLETIN, Vol. 25, issue No. 25, dated June 19, 1991, appearing on page 4.

The subheading is corrected to read:

"VARIANCES FROM QUARTERLY RATE FOR MAY 1991"

U.S. Customs Service

General Notice

NEW IMPORTER IDENTIFICATION NUMBERING SYSTEM

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of new importer identification numbering system.

EFFECTIVE DATE: July 1, 1991.

FOR FURTHER INFORMATION CONTACT: Entry Operations Branch, (202) 566-5307.

SUPPLEMENTAL INFORMATION: The Customs Service has undertaken a project to modernize the importer name, address and identification number file contained in our Automated Commercial System. A major objective of this project is to provide standardized data and uniformity of input into this file. A part of this project is the establishment of a new Customs assigned importer identification numbering system.

The Customs Service will implement a new Customs assigned importer identification numbering system on July 1, 1991. The new Customs assigned number will be automatically generated via the Automated Commercial System within Customs after an individual or business has made application for such a number on a Customs Form 5106.

In general, the new Customs assigned number will only be available to individuals and businesses which do not possess a valid Internal Revenue Service employer identification number or a Social Security number.

Pursuant to Section 24.5, Customs Regulations (19 CFR 24.5), an importer is required by Customs to be identified by a specific number. There are three types of numbers currently used by the Customs Service for this purpose. They are either an Internal Revenue Service employer identification number, a Social Security number, or a Customs assigned number. Section 24.5 states:

> If an Internal Revenue Service employer identification number, a Social Security number, or both, are obtained after an importer number has been assigned by Customs, a new Customs Form 5106 shall not be filed unless requested by Customs.

Pursuant to 19 CFR 24.5(c), this public notice is to serve as the request by Customs to furnish either an Internal Revenue Service

employer identification number or Social Security number for importers who have received a Customs assigned number. The position of the Customs Service is that each person who enters into a Customs transaction using an existing Customs assigned number shall update that identification number by furnishing the importer's Social Security number or Internal Revenue Service employer identification number within 30 days of receipt of such a number. The information should be furnished on a Customs Form 5106.

Each person who engages in a Customs transaction using a Customs assigned identification number issued prior to the new numbering system must update that identification number by furnishing a Social Security number or employer identification number if available. If a Social Security number or employer identification number is not available, application for a new Customs assigned number must be made on a Customs Form 5106.

Importers that need to obtain a new Customs assigned number (those that do not have an Internal Revenue Service employer identification number or Social Security number) are expected to obtain a new Customs assigned number and request that the old numbers be deactivated.

The format of the new Customs assigned number is YYDDPPNNNNN where YY is the calendar year of input, DDPP is the district and port code, and NNNNN is a sequentially system assigned number.

Because the importer identification number cannot be changed on a Customs bond using a rider, importers who have filed Customs bonds using a Customs assigned identification number must replace their existing bond, on their anniversary date, with a new bond and bond application using an Internal Revenue Service employer identification number or a Social Security number, or the importer must obtain a new Customs assigned number.

Customs expects a 1-year transition phase to accommodate all importers. During this period, Customs will allow for dual processing of old and new Customs assigned numbers.

A false statement contained on a Form 5106 may subject the filer to prosecution under the provisions of 18 U.S.C. 1001 or sanctions or penalties under other applicable laws or regulations.

This Notice supersedes the Federal Register Notice dated January 9, 1990, volume 55, number 6.

Dated: June 14, 1991.

SAMUEL H. BANKS,
Assistant Commissioner,
Office of Commercial Operations.

[Published in the Federal Register, June 19, 1991 (56 FR 28221)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91-45)

TEHNOIMPORTEXPORT AND PEER BEARING CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, TORRINGTON CO., DEFENDANT-INTERVENOR

Court No. 89-06-00337

Plaintiffs challenge the decision by the Department of Commerce to use surrogate pricing data from Portugal to determine the foreign market value of plaintiff's antifriction bearings from Romania. Plaintiffs also contest the decision to calculate overhead costs based on the costs of a firm under investigation, and the decision to base packing costs on the confidential data of a firm under investigation.

Finally, plaintiffs challenge Commerce's failure to correct clerical errors regarding the weights of rivets.

Held: The ITA's decision to use Portugal as the surrogate country for Romania is supported by substantial evidence and is otherwise in accordance with law and is affirmed. The decision to calculate overhead costs based on the figures of a firm under investigation also is affirmed because it was the best available information.

However, the use of confidential packing cost data without the consent of the firm whose costs they were was not in accordance with law and is remanded. The decision not to take into account respondents corrections regarding the weights of rivets is in accordance with law, except that the calculation of the weight of the rivets in bearing model 6203 2RSNR was so obviously wrong that it was an abuse of discretion not to correct it when the mistake was brought to Commerce's attention, and that calculation is also remanded.

[ITA determination is affirmed in part and remanded in part.]

(Dated June 4, 1991)

Cooter & Gell (John M. Gurley) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeanne E. Davidson);* of counsel: *Maria Solomon,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Charles A. St. Charles, Patrick J. McDonough) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, Tehnoimportexport and Peer Bearing Corp. ("Tehnoimportexport"), challenge the final determinations of the Department of Commerce, International Trade Administration ("Commerce" or "ITA") in *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Romania,* 54 Fed. Reg. 19,109 (1989). Specifically, plaintiffs contest the decision to use surrogate pricing data from Portugal to determine the foreign market value ("FMV") of plaintiffs' imported antifriction bearings ("AFBs") from Romania, and they also challenge the failure of the ITA to correct certain ministerial errors.

BACKGROUND

On March 31, 1988, The Torrington Company ("Torrington") filed an antidumping petition which alleged, *inter alia,* that imports of AFBs from Romania were being sold in the United States at less than fair value and were injuring, or threatening to injure, an American industry. General Administrative Record ("GAR") (Pub.) Doc. 1. The ITA initiated an investigation of Romanian AFBs on April 27, 1988. 53 Fed. Reg. 15,077 (1988). Because Romania has a non-market, or state-controlled, economy, the ITA was obliged to use data from a market economy country to determine the foreign market value of Romanian AFBs. 19 U.S.C. § 1677b(c) (1988); 19 C.F.R. § 353.8 (1988).[1]

The petition proposed Italy and Portugal as surrogate countries. GAR Doc. 1 at 95. Tehnoimportexport, on the other hand, suggested that Turkey, Yugoslavia or Indonesia should be considered. Romanian Record ("RR") (Pub.) Doc. 75. Later, Tehnoimportexport wrote that Mexico or, in the alternative, Yugoslavia, would be an appropriate substitute for Romania. RR (Pub.) Doc. 162. In a memorandum dated August 8, 1988, the ITA listed five potential surrogate countries: Portugal, Brazil, Mexico, Korea and Yugoslavia. RR (Pub.) Doc. 94 at 1. The ITA stated that these countries were selected "because we determined that their economies were comparable to that of Romania." *Id.* The factors considered in making these choices included gross per capita income and the distribution of labor between the agricultural and non-agricultural sectors; attached statistics support this conclusion.

Once the ITA had selected five possible surrogates for Romania, it sent questionnaires to companies and embassies in those countries requesting information regarding prices and the values of the factors of production. These questionnaires were sent out between August and September 1988. *See e.g.,* RR (Pub.) Docs. 101, 103, 126, 127, 138 and 147. The ITA indicated that, "no affirmative responses [were] received" from any of the companies contacted by the ITA. *Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Romania,* 53 Fed. Reg. 45,324, 45,326 (1988). Therefore, the ITA "used the factors of production valued in a comparable economy as the basis of foreign market value." *Id.* at 45,326-327. This methodology is expressly authorized by statute and regulation. 19 U.S.C. § 1677b(c); 19 C.F.R. § 353.8(c).

Furthermore, since no responses to its questionnaires were received by the ITA, the agency was authorized by Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(c) (1988), to use the best information otherwise available in its valuations of the factors of production. Where possible, "best information available was obtained from publicly available sources in Yugoslavia," the country selected as the most

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[1] A revised version of the regulation regarding calculation of foreign market value from state-controlled-economy countries is now found at 19 C.F.R. § 353.52 (1990).

comparable to Romania. 53 Fed. Reg. at 45,327. However, given the dearth of information gathered to that point, the ITA made clear that it would attempt to obtain more surrogate pricing data prior to the final determinations. *Id.* at 45,326.

The ITA's preliminary determinations were released on October 27, 1988, and were published on November 9, 1988, in the Federal Register. In them, the ITA chose to use certain factors of production from Yugoslavia as the basis for calculating the FMV of Tehnoimportexport's AFBs. The ITA reasoned that Yugoslavia's level of economic development most closely approximated Romania's. 53 Fed. Reg. at 45,327. However, since public information was not available for all factors of production from Yugoslavia, the ITA used data from other countries, including Mexico, for the valuation of the balance of the factors of production for purposes of the preliminary determinations.

The final determinations were issued on March 24, 1989 and published in the Federal Register on May 3, 1989. *Final Determinations,* 54 Fed. Reg. 19,109. The ITA stated that since it was unable to obtain adequate pricing information from Yugoslavia, it opted to change surrogates and use Portugal as the surrogate country for purposes of calculating the factors of production in the final determinations. 54 Fed. Reg. at 19,110. Portugal was chosen because its "level of economic development also closely approximates that of Romania" and it had been listed in the preliminary determinations as one of five possible surrogate countries. *Id.* Portuguese data was used for: Steel used to manufacture bearing cages; steel scrap; brass used in the manufacture of brass cages; overhead; and labor. *Id.* at 19,110–111. Because Portugal does not produce bearing quality steel, the ITA used "information obtained from the *World Material Study – Europe,* as provided by Torrington and verified by the Department" to value steel used to produce inner and outer rings, balls, and other components. *Id.* at 19,110.

Plaintiffs contend that the ITA should not have switched surrogates in mid-stream. They claim that Yugoslavia was the country most economically comparable to Romania and thus should have been used for the final determinations as well as the preliminary.

Discussion

A determination by the Department of Commerce will be affirmed unless that determination is not supported by substantial evidence or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988). Under this standard, Commerce is granted considerable deference in its interpretation of its statutory authority and the methodology employed in the administration of the antidumping law. *American Lamb Co. v. United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986). *See also Ceramica*

Regiomontana, S.A. v. United States, 10 CIT 399, 404, 636 F. Supp. 961, 965–66 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987).

Commerce's determination "will not be overturned merely because the plaintiff 'is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the agency's determination.'" *The Torrington Co. v. United States,* 14 CIT____, ____, 745 F. Supp. 718, 723 (1990), *quoting Hercules, Inc. v. United States,* 11 CIT 710, 755, 673 F. Supp. 454, 490 (1987). The evidence introduced by plaintiffs must be "enough to convince the Court that a reasonable mind would not have found ITA's evidence sufficient to support its conclusion." *Torrington,* 14 CIT at ____, 745 F. Supp. at 723.

Plaintiffs first contest the ITA's decision to use Portugal as the surrogate in the final determinations. Second, Tehnoimportexport faults the ITA for calculating overhead costs using unverified data from a Portuguese company that was related to a company under investigation. Similarly, plaintiffs claim that the ITA violated its own precedent and policy by calculating packing costs based on confidential data from a Swedish firm whose prior written permission was not obtained by the ITA and which firm was related to a firm under investigation. Finally, plaintiffs contest the ITA's decision not to make corrections regarding the weights of rivets.

I. *Use of Surrogate Pricing Data:*

When in the course of an antidumping investigation the ITA determines that the economy of the country from which the subject merchandise is exported is state-controlled, the agency is authorized to determine the FMV of the merchandise based on the "the best available information" regarding the values of the factors of production used in manufacturing the merchandise in a "market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(C)(1). If the ITA determines that adequate information is not available to determine FMV on this basis, then the agency may value FMV based on the price that merchandise which is "comparable to the merchandise under investigation," and "produced in one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country," is sold in other countries, including the United States. 19 U.S.C. § 1677b(c)(2).

Commerce has interpreted this rather convoluted passage to mean that, if the economy of the country from which the imported merchandise originates is state-controlled, then FMV shall be determined based on the prices "at which similar merchandise produced in a non-state-controlled-economy country or countries is sold either: (i) For consumption in the home market of that country or countries, or (ii) to other countries, including the United States." 19 C.F.R. § 353.8(a)(1). Alternatively, the ITA may determine FMV based on the constructed value of such or similar merchandise in a non-state-controlled-economy country. 19 C.F.R. § 353.8(a)(2). There is an express preference in the regulation for prices over constructed value.

The reason for this provision is so that the agency can acquire an accurate reading of the actual costs of a company operating in a state-controlled-economy. The non-state-controlled, or surrogate, country, however, should have an economy which is at a comparable level of economic development as the subject economy and should be a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(4); 19 C.F.R. § 353.8(b); *see The Timken Co. v. United States,* 12 CIT 955, 958–59, 699 F. Supp. 300, 303 (1988), *after remand,* 13 CIT ____, ____, 714 F. Supp. 535 (1989), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990); *Chemical Prods. Corp. v. United States,* 10 CIT 626, 630, 645 F. Supp. 289, 293 (1986). Of course, no two countries have identically developed economies, but to the extent possible, Commerce is required to compare similarly developed economies; for example, the United Kingdom would not make a suitable surrogate for Albania. Commerce's regulations further state that this comparability should be based on factors such as per capita gross national product and infrastructure development, particularly within that industry. 19 C.F.R. § 353.8(b)(1).

That Romania has a state-controlled-economy is not in issue. Tehnoimportexport's complaint is that the ITA abused its discretion by choosing Portugal as the surrogate, instead of Yugoslavia. Since Yugoslavia had been selected as the most comparable country in the preliminary determinations, and there allegedly was more publicly available information from Yugoslavia than from Portugal and the ITA did not give notice that it intended to switch surrogates, plaintiffs aver that Commerce's actions were improper. *Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Judgment on the Agency Record* ("Plaintiffs' Memorandum") at 2.

The fact that the ITA chose Yugoslavia as the most comparable country to Romania for the preliminary determinations, then used Portugal for the final determinations, is not evidence, in itself, to support the contention that the ITA abused its discretion. The reason for having both preliminary and final determinations is so the ITA can make corrections and adjustments to its preliminary findings and reach a more accurate conclusion in the final determinations. Some changes are to be expected in any final determination, and there was no obligation on the part of the ITA to notify the parties beforehand that there would be a different surrogate used in the final determinations than in the preliminary.

Nonetheless, the ITA did explain in the preliminary determinations that additional factfinding as to the surrogate country issue would be necessary prior to the final determinations. 53 Fed. Reg. at 45,326. Indeed, plaintiffs themselves proffered data on plausible proxies for Romania well after the preliminary determinations were issued. *See* RR (Pub.) Docs. 233, 249, 250 and 260. This included information on the value of the price of steel in Portugal and Korea, the cost of labor and electricity in Yugoslavia and the cost of gas and water in Mexico. *Id.* Hence, there exists ample evidence that Tehnoimportexport was aware

that a country other than Yugoslavia might be selected as the surrogate in the final determinations, and that Portugal was among the finalists.

The issue facing the Court is whether the ITA's choice of Portugal as a surrogate for purposes of the *final* determinations was supported by substantial evidence and was otherwise in accordance with law. The Court will not impose its choice of which economy is more comparable to Romania's, provided the choice made by Commerce is sufficiently reasonable and supported by the evidence. *See Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1050–51, 700 F. Supp. 538, 558 (1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990).

The Commerce regulation governing the selection of surrogate countries gives only nebulous guidance as to the factors to be considered by the ITA. The regulation refers to "generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise)." 19 C.F.R. § 353.8(b)(1). In choosing to consider Yugoslavia, Portugal, Mexico, South Korea and Brazil as potential surrogates for Romania prior to the preliminary determinations, the ITA examined gross national product ("GNP"), gross domestic product ("GDP") and the distribution of labor between agricultural and non-agricultural sectors of the countries for 1985.[2] RR (Pub.) Doc. 94 at 3. The figures for Yugoslavia were closest to those for Romania, and the ITA relied primarily on Yugoslavian factors of production in the preliminary determinations. *Id. See also* 53 Fed. Reg. at 45,327.

Although the record indeed indicates that among the five suitable surrogates, Yugoslavia was comparable to Romania, it is manifest from the evidence that Portugal too was economically comparable to Romania. *See* RR (Pub.) Doc. 94. The statistics supplied by Commerce show that in terms of gross domestic product, gross national product and labor distribution, Portugal and Romania were at a similar level of economic development. *Id.* Additionally, the law does not require the ITA to choose the *most* comparable economy, but rather *a* comparable economy. Clearly, the ITA has done so in this case. As both Portugal and Yugoslavia reasonably could have been selected as surrogates, the Court will not disturb the ITA's finding merely because Yugoslavia's figures were slightly closer to Romania's than Portugal's were.[3]

Furthermore, it does not appear from the record that the decision to change surrogates was made arbitrarily. Commerce stated in the final determinations that it was "unable to obtain adequate pricing data"

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[2] As a threshold issue, plaintiffs contest the ITA's use of 1985 data since the period of investigation was October 1987 to March 1988. However, the Government stated that 1985 was the closest year to the investigation for which data was available for all the countries involved. Comparing the data of various countries from different years clearly would have yielded skewed results; thus the Court finds no error in this decision.

[3] Plaintiffs go to considerable lengths to establish that the labor rates in Yugoslavia were significantly lower than the Portuguese rates. *Plaintiffs' Memorandum* at 18–22. Labor rates are not a factor to be considered when assessing comparability for these purposes, nor should they be. The cost of labor is but one tile of the mosaic which is reflected by the GNP. Selecting or disqualifying a potential surrogate on the basis of its labor rates would be fallacious, and would run contrary to the intent of the statute and regulations.

from Yugoslavia, and "[d]ue to the lack of information from Yugoslavia, we have chosen Portugal as the surrogate country for purposes of valuing the factors of production in these final determinations." 54 Fed. Reg. at 19,110. In fact, Tehnoimportexport's counsel acquiesced in a letter to Commerce on February 7, 1989, wherein counsel wrote that "to date it has been impossible to obtain steel prices in Yugoslavia." RR (Pub.) Doc. 249 at 1.

Lastly, plaintiffs assert that Portugal was a poor choice because there was more information publicly available from Yugoslavia. *Plaintiffs' Memorandum* at 27–28. Though such information is preferred, it is not imperative that the ITA choose the country with the most publicly available data. Regardless, the difference between the amount of public data obtainable from Yugoslavia as opposed to that from Portugal is not so substantial as to warrant a reversal of the agency's selection.[4]

Accordingly, the Court finds that Commerce's decision to use Portugal as a surrogate country for valuation of the factors of production in Romania was supported by substantial evidence and was otherwise in accordance with law, and is affirmed.

II. *Use of Data from Firms Under Investigation:*

Tehnoimportexport also contests the determinations on the basis that the ITA improperly used data on overhead and packing costs from companies which either were under investigation themselves or were related to companies under investigation. Plaintiffs cite a longstanding Commerce policy not to use pricing data from companies under investigation when determining FMV for a company from a state-controlled economy country. *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the Hungarian People's Republic,* 52 Fed. Reg. 17,428, 17,430 (1987). The reason for this policy is that such data is subject to manipulation.

A. *Overhead Data:*

During the period between the preliminary and final determinations, the ITA did not receive any responses to its questionnaires from the relevant companies in the potential surrogate countries regarding their overhead costs. The Tariff Act of 1930, as amended, provides that "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the ITA shall] use the best information otherwise available." 19 U.S.C. § 1677e(c).

Since those questioned did not provide the information Commerce sought, the ITA based overhead costs on best information available ("BIA"), pursuant to 19 U.S.C. § 1677e. *Defendant's Memorandum* at 36–37. Information regarding overhead costs was taken from a Portuguese company related to a German AFB manufacturer under

[4] The parties agree that Yugoslavian information was available for 69.7% of the factors of production, while Portuguese information was available for 59.6% of the factors of production. *Plaintiffs' Memorandum* at 27–28; *Defendant's Memorandum* at 25.

investigation, an apparent violation of Commerce's policy against using costs from such companies.

However, the related firm's costs were not used as direct price surrogates, but rather as BIA pursuant to 19 U.S.C. § 1677e. The policy proscribing use of a related firm's costs clearly does not apply to situations where that data is used as BIA. Commerce has much greater latitude under the BIA provisions than under normal conditions, that is, when the questioned firms respond to Commerce's request for information. *See N.A.R., S.p.A. v. United States,* 14 CIT___, 741 F. Supp. 936 (1990). Indeed, such information is not even required to be verified by the ITA. *Timken,* 12 CIT at 960, 699 F. Supp. at 305; *see also Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 34, 628 F. Supp. 198, 203 (1986). Therefore, provided the data is reasonable, it may be used to calculate FMV.

The overhead costs from Portugal were based on the undertakings of a Portuguese AFB producer, and were "estimated from the available data about the only Portuguese (German owned) company in the sector." RR (Pub.) Doc. 185; RR (Pub.) Doc. 298 at 3. Additionally, plaintiffs have offered no evidence that this data was inaccurate or had been manipulated. Therefore, the Court finds that the ITA's use of the overhead cost data of a firm related to a firm under investigation was in accordance with law, because none of the companies surveyed responded to Commerce's questionnaires, and the costs were calculated pursuant to the best information available provisions of the Tariff Act, to which the policy against use of such data is not applicable.

B. *Packing Data:*

Tehnoimportexport also challenges the use of packing cost data from a Swedish firm under investigation. In addition to the arguments, stated above, regarding the fact that the firm was under investigation, the packing data is opposed on the grounds that the ITA used the Swedish firm's confidential packing figures in contravention of agency policy. *Plaintiffs' Memorandum* at 39–40.

Regarding the use of a related firm's cost data, the Court's analysis of overhead costs above is also applicable to packing costs, inasmuch as the ITA used that data as BIA pursuant to 19 U.S.C. § 1677e when the questioned firms did not respond to requests for information. However, the use of confidential data without the communicated consent of the company from which the data is compiled is contrary to law and established ITA policy, a fact which the Government also acknowledges. *Defendant's Memorandum* at 2–3; *see* 19 U.S.C. § 1677f(b)(1) (1988); *China Nat'l Metal & Minerals Import & Export Corp. v. United States,* 11 CIT 859, 861, 674 F. Supp. 1482, 1484 (1987). Hence, the case is remanded to the agency in order for the ITA to recalculate packing costs in accordance with law and its own regulations and policy. Any consequent changes in the dumping margins are to be reported to this Court within sixty (60) days.

III. *Correction of Clerical Errors:*

Plaintiffs' final complaint is that the ITA improperly failed to correct clerical errors regarding the weights of rivets on certain types of bearings.[5] The contested types are series 6200, 6201, 6202, 6203, 6204 and 6304. *Plaintiffs' Memorandum* at 74. In a letter to Commerce on March 13, 1989, Tehnoimportexport explained that it had inadvertently overstated the weights of certain rivets in its questionnaire response and requested that the ITA correct them in the final determinations. RR (Pub.) Doc. 291; RR (Conf.) Doc. 41. Plaintiffs claim that correction of these mistakes could "result in an overall reduction of dumping margins by 5–10%." *Plaintiffs' Memorandum* at 76. The Government's response is that, since the corrected submissions were received after verification and only eleven days prior to the issuance of the final determinations, "the ITA had no way of determining the accuracy of any calculation errors * * * [and] no further adjustments were made for the final determination." *Defendant's Memorandum* at 39.

The ITA's regulations state that parties will be allowed to rectify a faulty submission provided "the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account." 19 C.F.R. § 353.51(b) (1988). The correction in this case was submitted more than three months after the ITA's on-site verification in Romania and eleven days prior to the issuance of the final determinations. Clearly, the correction was tendered at the last minute and the ITA acted according to its regulations in rejecting it. However, if the error was so egregious and so obvious that the failure to correct it was an abuse of discretion and undermined the interests of justice, the Court may remand the case to the ITA for adjustment of the calculations.

The error here concerns the weight of rivets, which are components of antifriction bearings. On December 5–9, 1988, an ITA investigative team conducted an on-site verification of respondent's questionnaire responses in Romania. During verification, the ITA found that the weight of the rivets on bearing model 6203 2RS had been overstated by ten times in Tehnoimportexport's response. RR (Conf.) Doc. 44 at 2. Though this mistake was corrected, the ITA staff accountant stated that he thought it was an "isolated incident" and there was no reason to believe the weights of the other rivets were mistaken as well. *Id.*

While in Romania, the ITA verified data regarding nine different types of plaintiffs' bearings, which bearings were manufactured in two of plaintiffs' four plants. RR (Conf.) Doc. 33 at 7. Plaintiffs are contesting the reported rivet weights of five types of bearings, only one of which was among the nine types verified by the ITA in its journey to Romania. Hence, the Government's claim that it could not amend its calculations

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[5] Plaintiffs incorrectly describe the errors as "ministerial." The mistakes in this case were made by plaintiffs, not the agency, hence they were not "ministerial" errors, but simply clerical errors made by a respondent in a submission to the ITA. The fact that the agency then adopted those figures does not convert respondent's mistake to ministerial error.

because there was no way of verifying the information is disingenuous; the information on which the ITA itself relied for most of the five contested types of bearings was not verified. If, by mere observation of the ITA's lists of the weights of the factors of production, the error regarding rivet weights was so obvious that to have left it unamended was plain error and an abuse of discretion, it must be corrected.

A review of five of the nine types of plaintiffs' bearings which the ITA verified reveals that rivets were assigned a weight of 0.00kg in four cases, meaning they weighed less than 0.01kg. RR (Conf.) Doc. 44 at Ex. II. In the fifth case, rivets were reported to weigh 0.08kg. Where they weighed less than 0.01kg, they apparently were not factored into the total weight of the bearings.[6] In the fifth case, the rivets weighed 14% of the total gross weight of the bearing. Id. Furthermore, the Court observed that, among the many other non-contested types, a random sampling of the proportionate weight of the rivets disclosed weights ranging from 10.8% to 19.5% of the total gross weight.[7] *Id.* Therefore, there appears to be a significant range of proportionate weight assigned to rivets which plaintiffs do not challenge.

Turning now to the contested bearings, the record shows that five of the twenty eight types within the contested series were assigned a weight of 0.00kg. *Id.* The remaining rivets were reported to comprise between 9% and 22% of the total gross weight of the bearings, except for one type which was reported to constitute 63.2% of the total gross weight of the bearing. *Id.* In the latter case, model 6203 2RSNR, the rivet was shown to make up more than three times as great a percentage of the total gross weight as the outer ring, which in virtually every other type of bearing forms a much more substantial proportion of the bearing.

Since the calculations of the rivet weights in most of the contested models generally coincide with the relative weights of rivets in the uncontested models, the Court finds that the mistake was not so obvious or egregious that the ITA should have known it was error and corrected it. Given the dilatory nature of plaintiffs' corrections, and the need to complete the final determinations, the Court finds that the ITA acted within its discretion in refusing to correct most of plaintiffs' mistakes. However, the mistake as to model 6203 2RSNR was so obvious that the failure to correct it did constitute an abuse of discretion. Therefore, the Court orders the ITA to correct that error and make any further adjustments as that change may require. Since the case is being remanded for recalculation of packing costs, the Court finds that this additional calculation will not overburden the agency and will advance the interests of justice and yield a more accurate result.

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[6] One of these four was the 6203 2RS type, whose weight the ITA corrected. RR (Conf.) Doc. 44.

[7] The Court randomly sampled bearing models 99502, FH 204-12G, FHS 204-12, and NJ 1040M.

CONCLUSION

The Court holds that the ITA's choice of Portugal as the surrogate for Romania and the calculation of overhead costs were supported by substantial evidence and were otherwise in accordance with law. The Court finds that the calculation of packing costs was not in accordance with law because the costs were taken from the confidential data of a firm without its permission.

Lastly, the Court finds that the calculation of the weights of rivets was in accordance with law, except that the calculation of the weight of the rivets on bearing model 6203 2RSNR was not in accordance with law for the reasons discussed above.

Accordingly, this case is remanded to the ITA for recalculation of packing costs, and recalculation of the rivet weight in the above-mentioned bearing, and the ITA shall make any other adjustments in its determinations as these changes may require. Commerce shall report the results of the remand determination to this Court within sixty (60) days of the date this opinion is entered.

(Slip Op. 91-46)

KERR-MCGEE CHEMICAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND MITSUI DENMAN (IRELAND) LTD., INTERVENOR-DEFENDANT

Court No. 89-03-00152

CHEMETALS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, MITSUI DENMAN (IRELAND) LTD., INTERVENOR-DEFENDANT

Court No. 89-03-00170

[Affirmed].

(Decided June 5, 1991)

Gardner, Carton & Douglas, (W.N. Harrell Smith, IV, M. Peter Adler, and *George N. Grammas)* for plaintiff Kerr-McGee Chemical Corp.

Squire, Sanders & Dempsey, (Ritchie T. Thomas, William D. Kramer, Dana M. Stein, and Miriam A. Bishop) for plaintiff Chemetals, Inc.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Jane E. Meehan); Gregory Shorin,* Attorney-Advisor, Office of the Chief Counsel for International Trade, United States Department of Commerce, of counsel, for the defendant.

Marks Murase & White, (Roger L. Selfe, Matthew J. Marks, Ramon P. Marks, and *Neil E. McDonell)* for the defendant-intervenor.

MEMORANDUM AND ORDER

RESTANI, *Judge:* Plaintiffs move for judgment on the administrative record of the Final Determination on Remand of the International

Trade Administration ("ITA" or "Commerce") and ask the court to determine that sales of Electrolytic Manganese Dioxide ("EMD") from Ireland were likely during the Period of Investigation ("POI"), December 1, 1987, to May 31, 1988, and to remand to ITA to determine the dumping margin. For the reasons stated below, the court denies plaintiffs' request and affirms ITA's determination.

PROCEDURAL HISTORY

The factual and procedural background of this case is set forth in the court's previous opinion, *Kerr-McGee Chemical Corp. v. United States*, 14 CIT____, 739 F. Supp. 613 (1990), with which the court presumes the reader to be familiar.

The court's major findings in that opinion were as follows. The court held that ITA had conducted an adequate investigation and had not abused its discretion in refusing to extend the POI backwards, but the court found that ITA was required to reconsider its determination that sales were not likely during the POI. *Id.* at 622 and 628. The court explained that ITA's key reasons for not finding likely sales were "all based on erroneous or unexplained standards." *Id.* at 622.

The court noted that the determination of no likely sales depended, under ITA's reasoning, on the lack of an irrevocable offer of sale during the POI. *Id.* at 623. Although ITA claimed to use a different definition of an irrevocable offer than that which practitioners and courts generally employ, the court found ITA's explanation insufficient, and that at the very least such a standard would be misleading. Moreover, the court noted that ITA defined "irrevocable" as "imminent,"[1] but that ITA had not explained why an irrevocable offer was more susceptible of imminent acceptance than a revocable offer. *Id.* at 624. The court also held that ITA's finding of no likely sales was not supported by the fact of incomplete qualification (for continuing use in the purchaser's battery production) of Mitsui Denman Ireland's ("MDI") EMD in this case, as sales for qualification were nonetheless sales. Finally, the court held that ITA did not properly analyze whether actual sales occurred a few days after the POI. Under the facts of record, such sales would indicate likely sales during the POI.

Accordingly, the court instructed ITA to "define a standard for determining whether sales are likely which considers industry practice and which will capture imminent sales." Because the purchase orders, which appeared to evidence actual sales, were canceled, the court also

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[1] The reference to "imminent sale" may find its origin in the legislative history of the Trade and Tariff Act of 1984, Pub. L. 98-573, Oct. 30, 1984, 98 Stat. 2948. A report by the House Committee on Ways and Means provided that an investigation may be initiated "where actual importation has not yet occurred but a sale for importation has been completed or is imminent." H.R. Rep. No. 725, 98th Cong., 2d Sess. 11, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5137.

directed ITA to "explain its policy on canceled sales in terms of the governing statute and this case."[2] *Id.* at 628.

The court's general instruction to ITA was to

> determine whether U.S. sales existed or were likely. In doing so it shall consider the relationship, if any, between the primary purchaser's orders and the preexisting Agreement, and it shall consider the activities discussed here of the primary purchaser, the potential purchaser and MDI.[3]

Id.

On July 11, 1990, plaintiff Kerr-McGee requested that ITA re-open the record on remand to take evidence on (i) industry practice as to the use (or non-use) of irrevocable offers, (ii) whether MDI and the primary purchaser reached a well defined agreement during the POI, and (iii) MDI's motivation in requesting the primary purchaser to cancel its June 9, 1988 orders.

On August 17, 1990, ITA sent a letter to counsel enclosing its draft remand determination stating that its request to reopen the record was denied. ITA did state, however, that it would accept factual information regarding the 1988 Agreement "that was *accessible and in existence* between the date verification was completed (December 16, 1988) and the signing of the Department's final determination (February 22, 1989)." Letter from Roland MacDonald, Director of Antidumping Compliance, to W. N. Harrell Smith IV of Drinker Biddle & Reath (Aug. 17, 1990); Appendix 2 to Memorandum in Support of Plaintiffs' Motion for Judgment upon the Agency Record After Remand ("P. Brief") (emphasis in original).

In its remand determination of October 12, 1990, Commerce stated:

> In determining whether the merchandise subject to investigation is likely to be sold in the United States at less than fair value, the Department requires evidence of an irrevocable offer to sell the subject merchandise. [Citation omitted]. The Department defines an irrevocable offer as an offer on the part of the seller binding it to sell the subject merchandise at a specific price for a specified period of time.

Remand Determination at 4.

Commerce noted that while other types of offers may indicate that a sale is likely to occur,

> more than a speculative potential of future sales is necessary to satisfy the likelihood of sales criteria of the Act. *Certain Carbon Steel*

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[2] Although Commerce held that canceled sales were "sales" for antidumping purposes, it failed to respond to the court's request that "ITA should explain if cancellations to avoid antidumping orders should be considered differently from other cancellations." 739 F. Supp. at 627. At oral argument, held on May 21, 1991, counsel for the government stated that ITA did not reach this question because it determined that the canceled purchase orders did not evidence sales. Although the requested finding has proved unnecessary for other reasons, ITA may not avoid directions to make findings on collateral issues. The court requires certain findings for reason of judicial economy when it is unclear that ITA is applying proper standards.

[3] "Primary purchaser" and "potential purchaser" refer to unrelated U.S. battery manufacturers. The activities of the "potential purchaser" are not pertinent to the objections to the remand determination.

> *Products from Czechoslovakia,* 50 Fed. Reg. 1912 (1985). In the absence of actual sales, the Department must have evidence that establishes, with a sufficient degree of definiteness, that a sale is imminent at a price sufficiently reliable to form the sole basis of a dumping determination.

Remand Determination at 3. Commerce proceeded to explain that

> irrevocable offers serve as a better benchmark of pricing practices than revocable offers, because if a seller's offer is revocable, it has the option of withdrawing or modifying the offer at any point in time * * * With irrevocable offers, the seller is bound to sell at a specific price; it does not have the option of withdrawing or modifying the terms of the offer * * *

Remand Determination at 4.

In discussing the two purchase orders from the primary purchaser, ITA stated that:

> *[o]ur examination of the record reveals that the two purchase orders essentially represent bids by a U.S. buyer to purchase the subject merchandise at a price and quantity specified by the buyer. In this industry, unless the purchase orders are tied to a larger agreement binding the seller to supply the merchandise at the price specified, the seller is not bound by the terms of the purchase order;* a valid contract is not formed. See C.R. Doc. 2 at 142A; C.R. Doc. 24 at 329A; P.R. Doc. 81 at 875. If the two purchase orders are tied to a comprehensive agreement to sell the subject merchandise to the U.S. purchaser, a valid contract would be formed upon issuance of the purchase orders.
>
> In this case, a purchasing agreement existed between MDI and the U.S. purchaser who issued the aforementioned purchase orders. However, this agreement only covered two grades of EMD produced by MDI. These grades were destined for sales to a third country and not to the United States. Since the agreement does not cover the EMD specified in the purchase orders, MDI was never bound to sell EMD to the United States at the stated price.
>
> Although the agreement provides for inclusion of other grades of EMD upon mutual written agreement, verification of customer files at MDI and Mitsui New York demonstrate that the agreement was not modified to include the subject merchandise. C.R. Doc. 24 at 333A–336A; C.R. Doc. 32 at 754A. *Therefore, the purchase orders were merely solicitations to purchase EMD by a U.S. buyer and did not represent actual sales (canceled or otherwise) of EMD.* The Department cannot make a finding of likely sales based solely on the existence of the two purchase orders, because they do not demonstrate that the *seller* was committed to sell the subject merchandise at a stated price for a specified period of time.

Remand Determination at 7–8 (emphasis added).

Commerce concluded that "[t]here were no sales made by MDI during the POI nor irrevocable offers to sell the subject merchandise during the POI which would indicate a likelihood of sales." Remand Determination at 6.

DISCUSSION

The parties expend much effort in disputing the proper amount of deference which the court must grant to ITA's interpretation of the statute. Defendant argues that the court must defer to the agency's expertise. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). Plaintiffs maintain that the question at issue is one of pure statutory interpretation and not one of agency discretion and, moreover, does not call for ITA's expertise.

Petitioners, relying on a leading pre-*Chevron* treatise, argue that *Chevron* is merely part of one of two lines of cases dealing with the amount of deference owed by the courts to an agency's interpretation of the statute it administers. One line standing for the proposition that substantial deference is proper, the other for the proposition that little or none is owed. *See* 5 K. Davis, *Administrative Law Treatise* § 29 (1978). Plaintiffs fail, however, to cite Professor Davis's post-*Chevron* supplement to his treatise, *Administrative Law of the Eighties* § 29 (1989), which indicates that the Supreme Court has closed off the line of cases standing for the proposition that the court may substitute its own interpretation of a statute for a reasonable interpretation by the agency charged with its administration, with which the court disagrees.

The court notes, however, that the amount of deference which courts of specialized jurisdiction must give to an agency's expertise may not parallel that of courts whose jurisdiction is more general. Moreover, the Court of Appeals for the Federal Circuit has stated that while

> [w]e give due weight to the agency's interpretation of the statute it administers, and we accept that interpretation if it is "sufficiently reasonable * * *" (citations omitted), we cannot sustain the ITA's exercise of administrative discretion if it contravenes statutory objectives. "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion'." [Citations omitted].

IPSCO, Inc. v. United States, 899 F.2d 1192, 1194–95 (Fed. Cir. 1990)(ITA improperly disregarded companies receiving little or no subsidy from the calculation of an average net subsidy) (emphasis in original). Thus, the first question confronting the court is whether the standards ITA applied in making its remand determination are the result of a reasonable interpretation and application of the governing statute.

In the last opinion, the court fully discussed the history of, and the court's concern with, the "irrevocable offer" standard. 739 F. Supp. at 623–24. In that case, ITA argued that "[t]he 'irrevocable offer' standard ensures that sales which are imminent will be captured, * * *" *Id.* at 624. The court stated that it was unclear how the "irrevocable offer" standard accomplished this. *Id.* Nevertheless, Commerce persists in its

failure to explain how this standard captures all imminent sales. Defendant argues that

> Commerce's irrevocable offer standard captures imminent sales by:
>
> > provid[ing] the Department with evidence that a seller is committed to sell the subject merchandise at a specified price: the seller does not have the option of withdrawing the offer for the period of time stated. The decision to purchase the merchandise at the specified price rests solely with the buyer for the period of irrevocability.

Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment upon the Agency Record After Remand ("D. Brief") at 11. None of this relates to imminence. Defendant goes on to argue that "[t]he only thing necessary to complete the sale is for the buyer to accept the seller's terms." *Id.* Of course, this is true of any *bona fide* offer which includes a price term. The court's fears are not allayed by Commerce's assurance that

> [t]he Department takes into account industry practice by allowing parties to provide the Department with evidence that offers in the industry in question, while not formally stating their irrevocability, nevertheless demonstrate, as a matter of practice, that a seller is *committed* to sell the subject merchandise at a specific price.

Remand Determination at 5 (emphasis added). Nothing indicates that, in the context of this case, Commerce means anything other than "irrevocable" by use of the word "committed."

Plaintiffs argue that the court should overrule the irrevocable offer standard in favor of the *bona fide* offer standard formerly used by ITA. *See Dismissal of Antidumping Petitions on Steel Products from Romania,* 47 Fed. Reg. 5,752 (Feb. 8, 1982). *Bona fide* offers encompass both revocable and irrevocable offers. Commerce argues that "[a]lthough it is possible, in certain instances, that revocable offers may indicate that sales are reasonably expected in the future, they do not demonstrate a commitment to a specific price on the part of the seller. Revocable offers can be withdrawn or revised at any time, encompassing such a wide spectrum of activities (including price lists and other forms of solicitation) that the price is too speculative upon which to base a LTFV determination." Remand Determination at 12.

It is simply not true that revocable offers do not demonstrate a commitment to a specific price by a seller. If the seller states a price term to which it will be committed if the buyer accepts, this represents a commitment. If a purchaser can bind a seller by accepting an offer to sell a specific quantity at a specific price then it is not apparent why this should not be any less a basis for a finding of likely sales than is an irrevocable offer. If a buyer cannot bind a seller by accepting an offer to sell, then the offer to sell is not a *bona fide* offer.

ITA has failed to provide any reasonable justification for its requirement that irrevocable offers exist in order for sales to be likely under 19

U.S.C. § 1673 (1988). There is apparently no support for the proposition that an irrevocable offer is more indicative of likely sales than one which is revocable. Nor does there appear to be any reason to believe that an irrevocable offer indicates that a sale is any more "imminent" than does a revocable offer. *See supra* at 3. As indicated in the previous opinion, the fact that some industries, such as the one at issue, apparently do not use the irrevocable offer device is of concern, as it would be contrary to Congress's intent to exempt such industries from a finding of likely sales. 739 F. Supp. at 624.

The court does accept, as a reasonable application of the statute, ITA's insistence on evidence of the seller's intention to sell at a specific price. A *bona fide* offer will satisfy this aspect of "likely sales." ITA, of course, may consider additional factors in deciding whether sales are imminent, depending on the facts of the particular case,[4] but ITA's use of a bright-line irrevocable offer standard to preclude a finding of likely sales in this case was not reasonable.

Nonetheless, the court finds that ITA'S negative determination on remand in this case should stand despite continued use of an "irrevocable offer" standard in this case. In the course of the remand investigation ITA made factual findings which, together with ITA's earlier factual findings, warrant a negative determination under any of the statutorily consistent standards discussed by the parties and the court in this matter.

As directed in the court's last opinion, 739 F. Supp. at 628, on remand ITA investigated whether MDI and the primary purchaser had made MDI's new EMD formulation a part of the 1988 Purchase Agreement. ITA concluded that they had not, despite the fact that the purchase orders referenced the Agreement. Thus, there were no actual, but canceled, sales under the Agreement. Plaintiffs do not challenge this finding.

The court also instructed ITA to examine the "activities" of the primary purchaser and MDI as evidenced in the record to determine if such activities indicated likely sales. *Id.* Although its overall finding of no likely sales was premised on the irrevocable offer standard, in the course of making that determination, Commerce also determined that nothing in the record indicated that the purchase orders constituted anything other than solicitations. Remand Determination at 8. Application of a particular standard does not alter this factual finding, but plaintiffs challenge this factual conclusion.

Plaintiffs claim that the record indicates that, in the EMD industry, long-term agreements cover only qualified EMD, not EMD for qualification purposes, and challenge ITA's conclusion that if orders are not tied to such agreements, that they never bind the seller. In essence they claim that for *unqualified* merchandise, purchase orders follow oral

[4] For example, the seller may be willing to sell at a certain price, but if there is no buyer immediately on the horizon, it would be difficult to call the sale "imminent."

offers to sell specific quantities at a specific price. Plaintiffs cite what they refer to as evidence of a course of dealing between the parties. Confidential Record Document 13, at 248A–49A. The cited document, however, deals with a small purchase made prior to the 1988 Agreement. Its existence does not conflict with ITA's view that large purchases for qualification would be made only pursuant to the later existing written Agreement.[5] In ITA's view the fact that the primary purchaser referenced the 1988 Agreement on the purchase orders indicates that it intended to make this purchase, for qualification purposes, pursuant to the 1988 Agreement, notwithstanding that it failed to do so properly. Based on the facts of record ITA cannot be said to have erred in finding that the failure to amend the 1988 Agreement to cover the large qualification bid is evidence that the seller had not committed itself to the price on the purchase orders. In addition, the Verification Report indicates that contacts between the primary purchaser and MDI near the end of the POI amounted to nothing more than "an inquiry to Mitsui NY * * *" Public Document 76, at 765.[6] ITA's factual conclusions regarding the course of conduct of parties are supported by substantial evidence.

The court declines to examine issues relating to the Statute of Frauds or equitable estoppel. The ultimate issue before ITA is not whether there was an enforceable sales agreement, but whether the seller was ready, willing and able to sell a specific quantity at a specific price and whether a buyer was equally ready, willing and able to buy the same, so that sales may be said to be imminent. As indicated, ITA found that the purchase orders were not made pursuant to the 1988 Sales Agreement and that sales would not have been made except in accordance with a modification of that agreement. ITA found such modification did not occur. These factual conclusions preclude a finding that the seller intended to sell the EMD grade at issue at the price stated in the purchase orders and that the sales were imminent.

CONCLUSIONS

Despite the court's inability to accept the "irrevocable offer" standard applied in the remand, the court nevertheless upholds ITA's determination because the factual findings made in its original determination combined with those made on remand require a negative determination, under any reasonable standard of likelihood of sales. Accordingly, the determination is AFFIRMED.

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[5] Although prior to remand the court found that the record would support a finding of the existence during the POI of a well-defined agreement to sell, ITA's factual findings on remand were to the contrary.

[6] It may be that, because ITA's case officer relied on the irrevocable offer standard during her investigation, she failed to adequately follow up leads to an oral, revocable offer which, combined with the post POI orders, and other evidence of a course of dealing could indicate likely sales during the POI. Plaintiff Kerr-McGee, in its complaint of April 19, 1989, and again in plaintiffs' brief submitted prior to the court's remand order, requested that the ITA conduct a broader investigation. The request, however, was not specifically directed to the oral discussions of April and May, 1988. At that time, plaintiffs were asking for both retroactive and subsequent extension of the POI, as well as investigation of all potential domestic EMD customers. At this late date, to order an investigation into the nature of oral discussions assuredly would render little useful information.

(Slip Op. 91-47)

UNITED STATES, PLAINTIFF *v.* VALLEY STEEL PRODUCTS CO. AND VALLEY INDUSTRIES, INC., DEFENDANTS

Court No. 88-08-00686

Defendants move to strike plaintiff's request for relief, purporting that plaintiff seeks to recover multiple penalties for the same violation of section 592 of the Tariff Act of 1930, as amended, and that plaintiff seeks an excessive penalty.

Held: The Government is not improperly attempting to collect multiple penalties for the same violation since the defendants' alleged acts were separate and distinct from those of others charged with violations of the same statute regarding the subject merchandise. Furthermore, the amount sought by plaintiff falls squarely within the limit established by section 592, and therefore, it is not, as a matter of law, excessive.

[Defendants' motion to strike is denied.]

(Dated June 7, 1991)

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer,* Senior Trial Counsel); of counsel: *Kathleen L. Bucholtz,* Deputy Regional Counsel, United States Customs Service, for plaintiff.

Guilfoil Petzall & Shoemake (*Jim J. Shoemake* and *Kurt S. Odenwald*) for defendants.

MEMORANDUM OPINION

TSOUCALAS, *Judge:* Defendants, Valley Steel Products Company and Valley Industries, Inc. (collectively "Valley"), move to strike the Government's request for relief and seek a determination in advance of trial that the Government may not recover a penalty greater than that which is reasonably calculated to make it whole.

The underlying action involves an attempt by the United States to recover approximately $13 million in civil penalties from defendants pursuant to section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988), for false and fraudulent statements, acts and/or omissions, which defendants made, or aided and abetted, in connection with forty-three consumption entries of steel products.

Valley asserts first that, since section 592 is remedial in nature, "the government is not entitled to recover a penalty that is greater than any loss of revenue proven by the government and its costs in this action." *Memorandum in Support of Motion to Strike Plaintiff's Request for Relief* at 6. This argument is remarkably similar to one propounded by defendants and rejected by the Court in *United States v. Valley Steel Prods. Co.,* 14 CIT____, 729 F. Supp. 1356 (1990). There the defendants alleged that the Government's effort to extract civil penalties under section 1592 violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because defendants had already been subject to criminal sanctions for the same acts.

In rejecting defendants' claims, the court stated that, where a civil penalty is not fixed by statute, serves a remedial purpose and provides a reasonable remedy, it was not a violation of the Double Jeopardy Clause to impose civil as well as criminal penalties. *Id.* at ____, 729 F. Supp. at 1359. The court added that the statute did not lose its remedial nature

because of the difficulty in ascertaining the precise monetary loss suffered by the Government. It was sufficient that the cost of investigating and prosecuting the case, as well as the "diffuse harm from trade, economic, and foreign policy repercussions" had damaged the Government. *Id.* at ____, 729 F. Supp. at 1360. Hence, Valley's argument that the Government is not entitled to a penalty which is greater than the proven loss of revenue is scurrilous at best. The purpose of this penalty is not just to replace lost levies, but to remedy a wrong, whether or not that wrong can be traced to precise revenue losses.[1]

Valley also claims that the Government cannot recover civil penalties regarding seventeen of the forty-three entries because it already has recovered sums from Hanwa and Samsung, two firms which supplied Valley with steel. Though the allegations regarding Valley relate to the same falsified documents as the allegations against Hanwa and Samsung, the role of Valley was not the same as the role of the others. Hanwa and Samsung were charged with entering merchandise into the United States by means of a false statement or document, while Valley is charged with aiding or abetting Hanwa and Samsung in their illegal acts. Two separate provisions of section 592 are implicated: 19 U.S.C. § 1592(a)(1)(A) and 19 U.S.C. § 1592(a)(1)(B).

In addition, while the Government may not assess multiple penalties for a single violation, Customs is empowered under section 592 "to assess separate penalties for separate violations on the same merchandise." *United States v. F.H. Fenderson, Inc.*, 11 CIT 199, 205, 658 F. Supp. 894, 899 (1987). In *Fenderson*, both the exporter and the customhouse broker were charged with violations of section 592 arising from the same transaction. Defendants there asserted the same defense as Valley, to wit, that Customs had assessed multiple penalties for the same violation. However, the court found that the alleged violations "were the result of separate and distinct acts" where the exporter's violation was presenting invoices containing false statements and the broker's violation was filing entries with incorrect dutiable values. *Id.*

Here, in the seventeen cases in which both Valley and the others were charged, Valley's alleged violation was aiding and abetting Hanwa and Samsung in their illegal acts by participating and assisting in "designing and implementing the plan which enabled its suppliers to submit * * * false documents. Valley did this by agreeing to accept and then pay the amounts stated on the falsely inflated invoices provided by its suppliers. Further, Valley established an elaborate mechanism by which it

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[1] 19 U.S.C. § 1592(a)(1) provides:

(1) General Rule. – *Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby,* no person, by fraud, gross negligence, or negligence –

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of–

(i) any document, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(Emphasis added.)

could surreptitiously receive a refund of its overpayments." *Plaintiff's Opposition to Defendants' Motion to Strike Plaintiff's Request for Relief* at 8. These allegations are separate and distinct from those with which Hanwa and Samsung, as the importers of record, were charged. Therefore, the Court holds that the Government is not barred from attempting to assess penalties against Valley for these acts. Of course, whether the Government can prove its allegations against Valley is a separate issue for the trier of fact.

Valley also asserts that if the full amount of relief sought by the Government, over $13 million, is granted, it would constitute an "excessive fine," which is proscribed by the Eighth Amendment. Since the amount claimed by the Government falls within the statutory limit in that it is "an amount not to exceed the domestic value of the merchandise," the Court cannot declare that, as a matter of law, it is excessive. 19 U.S.C. § 1592(c)(1).[2] Moreover, no fine has yet been assessed, and the trial has not even begun. For the Court, at this stage, to suggest what a proper fine might be would be wholly inappropriate and would constitute an unconstitutional advisory opinion. The amount of the penalty to be assessed is within the sound discretion of the Court, but only after a violation of section 592 has been proven. 19 U.S.C. § 1592(e)(1). *See also Valley Steel*, 14 CIT at ____, 729 F. Supp. at 1359. If and when a penalty is assessed, then the issue of whether the penalty is excessive may be raised.

Lastly, defendants assert that the Due Process Clause of the Fifth Amendment precludes the relief requested. Valley cites to a decision of the Supreme Court wherein it was stated that civil penalties come into conflict with the Due Process Clause where they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

The penalty claimed by the Government in this case is within the range prescribed by the statute. 19 U.S.C. § 1592(c)(1). Since defendants have not attacked the constitutionality of the statute itself, and since no trial has been held to determine whether a penalty will be assessed at all, the issue of whether the potential penalty violates the Due Process Clause is not ripe for decision.

Accordingly, defendants' motion to strike plaintiff's request for relief is denied.

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[2] 19 U.S.C. § 1592(c)(1) provides that: "A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise."

(Slip Op. 91 48)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND UAW LOCAL 595, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 90-05-00263

[Remanded.]

(Decided June 7, 1991)

Jordan Rossen, General Counsel, International Union, UAW, *Leonard R. Page,* Associate General Counsel, International Union, UAW, *(Richard W. McHugh),* Associate General Counsel, International Union, UAW, for plaintiffs.

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MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiffs, former employees of a General Motor assembly plant in Linden, New Jersey, challenge the Department of Labor's denial of certification for trade adjustment assistance benefits under 19 U.S.C. § 2272 (1988). This Court has jurisdiction under 19 U.S.C. § 2395 (1988) and 28 U.S.C. § 1581(d)(1) (1988).

Trade adjustment assistance is available to workers separated from employment when Labor determines, *inter alia,*

> that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a)(3) (1988). Labor denied plaintiffs' petition because it did not satisfy this requirement.

Plaintiffs assembled "L-body" vehicles, which GM sells as Chevrolet Corsicas and Berettas. R. 22. The Beretta is a two-door sedan which seats four adults, has a wheelbase of 103.4 inches, is available with a standard four-cylinder or an optional six-cylinder engine and had a 1989 base price of $11,000. The Corsica is a four-door sedan built on the same chassis, with the same wheelbase and engine options and having a 1989 base price of $10,410.

In order to determine whether increased imports of like or directly competitive articles contributed to the workers' separations, Labor examined changes in domestic and import market share. Labor began its analysis by using an accepted industry source to ascertain the characteristics of the L-bodies. Using the same source, Labor compiled a list of domestic and imported models it considered "like or directly competitive" with the L-bodies.

Labor found that the L-bodies would be competitive with cars having the following characteristics:

> 1. Vehicles in the classification should generally be offered in both two-door and four-door form. There should be seating for at

least four adults, even in the two-door versions. Sports cars and sports coupes of the 2+2 configuration compete most directly in other classes.

2. Base prices should generally fall into the $8,000 to $10,000 range. For the most part, sticker prices for well-equipped models range from $12,000 to $14,000, possibly as high as $15,000. These prices should be used for comparison only. Individual dealer policies, the existence of publicized or secret rebates, etc. make determinations of actual as-delivered prices impossible.

3. In exterior size, wheelbase should fall between 97 and 103 inches. Two-door versions are usually a little shorter than four-door versions of the same nameplate; this is not true of the L-bodies, which share the same chassis.

4. Standard engines should be four-cylinder types; optional engines should be no larger than small six-cylinder types.

R. 18.

Labor selected 27 domestic and 30 imported vehicles for investigation. R. 17.

Labor's findings must be upheld if they are supported by substantial evidence on the record and in accordance with law. 19 U.S.C. § 2395(b) (1988); *Woodrum v. Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd sub nom. Woodrum v. United States,* 2 Fed. Cir. (T) 82, 737 F.2d 1575 (1984). In addition, Labor's determination must be based on a reasoned analysis. *Former Employees of Bass Enters. Prod. Co. v. United States,* 12 CIT 470, 472, 688 F. Supp. 625, 627 (1988). Upon a showing of good cause, a reviewing court may remand an action for further investigation. 19 U.S.C. § 2395(b); *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT____, 715 F. Supp. 378, 381 (1989).

At oral argument, plaintiffs conceded the criteria Labor established for determining competing vehicles are reasonable, but claim Labor's determination lacks reasoned analysis because many of the vehicles Labor selected for analysis do not meet the criteria. Labor agreed the record lacks a reasoned explanation why Labor included in its analysis vehicles which differ substantially from the stated criteria.

Labor agreed to accept from plaintiffs a list of vehicles they believe should have been excluded or included in Labor's analysis, together with plaintiffs' reasons for exclusion or inclusion. The Court assumes Labor will consider all relevant information in order to reach an accurate and clearly articulated determination. Accordingly, the Court remands this action to Labor.

It is, therefore,

ORDERED that the negative determination regarding eligibility to apply for trade adjustment assistance with regard to former employees of the Buick-Oldsmobile-Cadillac Assembly Plant of the General Motors

Corporation in Linden, New Jersey is remanded to the Department of Labor, and it is further

ORDERED that plaintiffs shall have 15 days from the date of this order to submit to Labor a list of vehicles which the plaintiffs believe should have been excluded from or included in either the domestic or foreign subcompact/compact categories considered by Labor in its initial investigation, together with plaintiffs' reasons for the exclusion or inclusion, and it is further

ORDERED that Labor shall explain why Labor considered vehicles in the domestic and foreign subcompact/compact categories which deviated in some substantial way from the four enumerated characteristics which formed the basis of its industry analysis, and it is further

ORDERED that copies of the pages from all sources which are consulted by Labor shall be included in any supplemental record filed with the remand results, and it is further

ORDERED that the remand results shall be filed by Labor within 60 days of the date of this order.

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